

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DANIEL BANKS,

Petitioner,

v.

Civil Action No. 5:08CV162
(Criminal Action No. 5:05CR30)

UNITED STATES OF AMERICA,

(STAMP)

Respondent.

MEMORANDUM OPINION AND ORDER
DENYING CERTIFICATE OF APPEALABILITY

On September 29, 2010, this Court issued a memorandum opinion and order affirming and adopting the report and recommendation of the magistrate judge and denying the petitioner's § 2255 petition. The order indicated that the petitioner had been properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the petitioner failed to object, this Court found that he waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

On October 12, 2010, the United States Court of Appeals for the Fourth Circuit issued an order remanding this case to the district court for the limited purpose of permitting the district court to supplement the record with an order granting or denying a certificate of appealability. The Fourth Circuit cites to Rule 11(a) of the Rules Governing Section 2254 and Section 2255 Cases, which provides that the district court "must issue or deny a

certificate of appealability when it enters a final order adverse to the applicant" in such cases. Although this Court's memorandum opinion and order stated that the petitioner has waived his right to seek appellate review, it did not specifically issue or deny a certificate of appealability.

This Court hereby finds that it is inappropriate to issue a certificate of appealability in this matter. Specifically, the Court finds that the petitioner has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). Upon review of the record, this Court finds that the petitioner has not made the requisite showing. Accordingly, the petitioner is DENIED a certificate of appealability.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to the pro se petitioner by certified mail and to counsel of record herein.

DATED: October 13, 2010

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE